

LORI S. HOLMES,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE, C  
of Social Security,  
Defendant.

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 19, 27.) Attorney Maureen Rosette represents Lori S. Holmes, (Plaintiff); Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

Plaintiff protectively filed for disability insurance benefits and Supplemental Security Income (SSI) on March 31, 2004. (Tr. 194.) She alleged disability due to lead poisoning, copper slivers, skin problems, carpal tunnel syndrome, hip and lower back problems, and depression. (Tr. 172, 619.) She alleged an onset date of February

1 10, 2000. (Tr. 143.) Benefits were denied initially and on  
2 reconsideration. Plaintiff timely requested a hearing before an  
3 administrative law judge (ALJ), which was held before ALJ Richard  
4 Say on June 27, 2007. (Tr. 601-28.) At the hearing, Plaintiff's  
5 representative amended the alleged onset date to December 2002 when  
6 she last worked. (Tr. 607.) Plaintiff and vocational expert Tom L.  
7 Moreland (VE) testified. The ALJ denied benefits on July 16, 2007,  
8 and the Appeals Council denied review. (Tr. 55-72, 7-10.) The  
9 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
12 court set out the standard of review:

13 A district court's order upholding the Commissioner's  
14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
15 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
16 Commissioner may be reversed only if it is not supported  
17 by substantial evidence or if it is based on legal error.  
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
19 Substantial evidence is defined as being more than a mere  
20 scintilla, but less than a preponderance. *Id.* at 1098.  
21 Put another way, substantial evidence is such relevant  
22 evidence as a reasonable mind might accept as adequate to  
23 support a conclusion. *Richardson v. Perales*, 402 U.S.  
24 389, 401 (1971). If the evidence is susceptible to more  
25 than one rational interpretation, the court may not  
26 substitute its judgment for that of the Commissioner.  
27 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
28 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence

1 supports more than one rational interpretation, the court may not  
2 substitute its judgment for that of the Commissioner. *Tackett*, 180  
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
4 Nevertheless, a decision supported by substantial evidence will  
5 still be set aside if the proper legal standards were not applied in  
6 weighing the evidence and making the decision. *Browner v. Secretary*  
7 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
8 there is substantial evidence to support the administrative  
9 findings, or if there is conflicting evidence that will support a  
10 finding of either disability or non-disability, the finding of the  
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
12 1230 (9<sup>th</sup> Cir. 1987).

#### 13 **SEQUENTIAL EVALUATION**

14 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
15 requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are  
17 "under a disability" are eligible to receive benefits. 42  
18 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
19 medically determinable physical or mental impairment"  
20 which prevents one from engaging "in any substantial  
21 gainful activity" and is expected to result in death or  
22 last "for a continuous period of not less than 12 months."  
23 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
24 from "anatomical, physiological, or psychological  
25 abnormalities which are demonstrable by medically  
26 acceptable clinical and laboratory diagnostic techniques."  
27 42 U.S.C. § 423(d)(3). The Act also provides that a  
28 claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

In evaluating whether a claimant suffers from a  
disability, an ALJ must apply a five-step sequential  
inquiry addressing both components of the definition,

1 until a question is answered affirmatively or negatively  
 2 in such a way that an ultimate determination can be made.  
 3 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 4 claimant bears the burden of proving that [s]he is  
 5 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

6 The Commissioner has established a five-step sequential  
 7 evaluation process for determining whether a person is disabled. 20  
 8 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
 9 137, 140-42 (1987). In steps one through four, the burden of proof  
 10 rests upon the claimant to establish a prima facie case of  
 11 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
 12 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
 13 establishes that a physical or mental impairment prevents her from  
 14 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),  
 15 416.920(a). If a claimant cannot do her past relevant work, the ALJ  
 16 proceeds to step five, and the burden shifts to the Commissioner to  
 17 show that (1) the claimant can make an adjustment to other work; and  
 18 (2) specific jobs exist in the national economy which claimant can  
 19 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*  
 20 *Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

#### 21 STATEMENT OF THE CASE

22 The facts of the case are set forth in detail in the transcript  
 23 of proceedings and are briefly summarized here. At the time of the  
 24 hearing, Plaintiff was 45 years old, single, and living in a trailer  
 25 with two friends. She had a high school equivalency degree and two  
 26 years of community college. (Tr. 604-06.) She had past work  
 27 experience as care giver, a smelter laborer, a taxi driver, and an  
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1 inventory clerk. Her last job was as a taxi driver, which she quit  
2 due to her dermatitis and alopecia in 2002. (Tr. 609.) She  
3 explained her skin problems and lack of hair made her self-conscious  
4 and she did not want to be out in public. (Tr. 618-20.) She also  
5 testified that in spite of surgery, she still suffered symptoms of  
6 carpal tunnel syndrome which made it difficult for her to drive long  
7 distances. She reported she did not take prescription medication  
8 for her symptoms. (Tr. 586.) Plaintiff testified she was able to  
9 lift thirty pounds but had problems picking up and holding on to  
10 things due to hand numbness caused by carpal tunnel symptoms. She  
11 stated she could sit for about an hour, stand for a half hour, walk  
12 a couple of miles, and had no problem with steps. (Tr. 612-13.)  
13 She reported she could write for about ten minutes at a time before  
14 she had to stop due to hand cramps. (Tr. 614-15.) She also  
15 reported problems with depression. (Tr. 619.)

#### 16 ADMINISTRATIVE DECISION

17 At step one, ALJ Say found Plaintiff had not engaged in  
18 substantial gainful activity during the relevant period. (Tr. 60.)  
19 At step two, he found Plaintiff had severe impairments of "bilateral  
20 carpal tunnel syndrome, status post releases, osteoarthritis of the  
21 right knee status post arthroscopy, and depression." (Tr. 61.)  
22 After a discussion of the medical evidence, ALJ Say found the  
23 medical diagnoses in the record of dermatitis, hip pain, and lupus  
24 were non-severe impairments. (Tr. 67.) At step three, he found  
25 Plaintiff's impairments, alone and in combination, did not meet or  
26 medically equal one of the listed impairments in 20 C.F.R., Appendix  
27 1, Subpart P, Regulations No. 4 (Listings). (*Id.*) At step four,  
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1 the ALJ determined Plaintiff had the residual functional capacity  
2 (RFC) to perform light work, with the ability to "frequently climb  
3 ramps or stairs and occasionally climb ladders, ropes, or  
4 scaffolds." (Tr. 67.) Other non-exertional limitations identified  
5 were occasional stooping, crouching, crawling, and kneeling, the  
6 avoidance of vibration, and the avoidance of copper, lead, and other  
7 metal dust. ALJ Say determined Plaintiff was capable of multi-step,  
8 detailed tasks, superficial public contact, but would respond slowly  
9 to transition and change. (Tr. 67-68.)

10 In his step four findings, the ALJ summarized Plaintiff's  
11 testimony and determined she was less than fully credible. (Tr. 68-  
12 69.) Based on the RFC and VE testimony, the ALJ concluded Plaintiff  
13 could still perform her past work as a taxi driver as she previously  
14 performed it. (Tr. 70.) Because the DICTIONARY OF OCCUPATIONAL TITLES  
15 describes taxi driver as "medium level" work, the ALJ proceeded to  
16 step five and found there were other light, unskilled jobs Plaintiff  
17 could perform in the national economy such as assembler of small  
18 electronic products, electrical assembly, and laundry worker. (Tr.  
19 70-71.) He concluded Plaintiff had not been under a disability as  
20 defined by the Social Security Act from December 31, 2002, through  
21 the date of his decision. (Tr. 71.)

## 22 ISSUES

23 The question is whether the ALJ's decision is supported by  
24 substantial evidence and free of legal error. Plaintiff argues the  
25 ALJ erred when he: (1) found her testimony was not credible; and (2)  
26 rejected the opinions of examining psychologist Frank Rosekrans,  
27 Ph.D., and mental health counselor Shari Lyszkiewicz, M.S., L.M.H.C.

1 Plaintiff also contends remand is necessary for the consideration of  
2 new mental health records obtained after the ALJ's decision was  
3 rendered and reviewed by the Appeals Council.<sup>1</sup> (Ct. Rec. 20, 29.)

#### 4 DISCUSSION

##### 5 A. Credibility

6 When the ALJ finds a claimant's statements as to the severity  
7 of impairments, pain, and functional limitations are not credible,

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9 <sup>1</sup> When the Appeals Council considers evidence submitted after  
10 the ALJ's decision in the context of denying review, the issue on  
11 appeal to federal court becomes whether the record is limited to the  
12 evidence presented to the ALJ or also includes the new evidence  
13 submitted to the Appeals Council, but never seen by the ALJ. In the  
14 Ninth Circuit, when the Appeals Council specifically considers new  
15 materials in the context of denying a claimant's request for review,  
16 "we consider the rulings of both the ALJ and the Appeals Council,"  
17 and the record includes the ALJ's decision as well as the new  
18 evidence. *Gomez v. Chater*, 74 F.3d 967, 971 (9<sup>th</sup> Cir. 1996); *Ramirez*  
19 *v. Shalala*, 8 F.3d 1449, 1452 (9<sup>th</sup> Cir. 1993). If the new evidence  
20 shows there is a reasonable possibility that it would change the  
21 outcome of the ALJ's determination, then remand is appropriate to  
22 allow the ALJ to consider the evidence. However, if the substantial  
23 weight of the evidence is irrefutably clear that the claimant is  
24 disabled, then a remand for benefits is appropriate. *Mayes v.*  
25 *Massanari*, 276 F.3d 453, 462 (9<sup>th</sup> Cir. 2001). Because the Appeals  
26 Council considered Plaintiff's new mental health records, (Tr. 7-  
27 8), the new evidence is part of the record on review by this court.

1 the ALJ must make a credibility determination with findings  
2 sufficiently specific to permit the court to conclude the ALJ did  
3 not arbitrarily discredit claimant's allegations. *Thomas v.*  
4 *Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002); *Bunnell v. Sullivan*,  
5 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991) (en banc). It is well-settled,  
6 however, that an ALJ cannot be required to believe every allegation  
7 of disabling symptoms, even when medical evidence exists that a  
8 claimant's condition may produce alleged symptoms. Although a  
9 medical condition may produce impairments, they may not be severe  
10 enough to preclude gainful employment. See *Fair v. Bowen*, 885 F.2d  
11 597, 603 (9<sup>th</sup> Cir. 1989).

12 If there is no affirmative evidence of malingering, the ALJ  
13 must provide "clear and convincing" reasons for rejecting a  
14 claimant's symptom testimony. *Reddick v. Chater*, 157 F.3d 715, 722  
15 (9<sup>th</sup> Cir. 1998). The ALJ engages in a two-step analysis in deciding  
16 whether to admit a claimant's subjective symptom testimony.  
17 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9<sup>th</sup> Cir. 2007);  
18 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the  
19 first step, the ALJ must find the claimant has produced objective  
20 medical evidence of an underlying impairment, and that the  
21 impairment, or combination of impairments, could reasonably be  
22 expected to cause "some degree of the symptom." *Lingenfelter*, 504  
23 F.3d at 1036. Once the first test is met, the ALJ must evaluate the  
24 credibility of the claimant and make specific findings supported by  
25 "clear and convincing" reasons. *Id.*

26 Although an adjudicator may not reject a claimant's complaints  
27 solely on a lack of objective medical evidence to support the degree  
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1 of severity alleged, medical evidence is a relevant factor to  
2 consider. *Social Security Ruling (SSR) 96-7p.*<sup>2</sup> In addition, the ALJ  
3 may consider the following factors when weighing the claimant's  
4 credibility: the claimant's reputation for truthfulness;  
5 inconsistencies either in her allegations of limitations or between  
6 her statements and conduct; daily activities and work record; and  
7 testimony from physicians and third parties concerning the nature,  
8 severity, and effect of the alleged symptoms. *Light v. Social Sec.*  
9 *Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997); *Fair*, 885 F.2d at 597 n.5.

10 The ALJ may also consider an unexplained failure to follow  
11 treatment recommendations and testimony by the claimant "that  
12 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,  
13 1039 (9<sup>th</sup> Cir. 2008). As explained by the Commissioner in his policy  
14 ruling, the ALJ need not totally reject a claimant's statements; he  
15 or she may find the claimant's statements about pain to be credible  
16 to a certain degree, but discount statements based on an  
17 interpretation of evidence in the record as a whole. *SSR 96-7p.*  
18 The ALJ may find a claimant's abilities are affected by the symptoms  
19 alleged, but "find only partially credible the individual's  
20 statements as to the extent of the functional limitations." *Id.*

21 Here, there is no finding of malingering. After summarizing

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23 <sup>2</sup> Social Security Rulings are issued to clarify the Regulations  
24 and policy. They are not published in the federal register and do  
25 not have the force of law. However, under the case law, deference  
26 is to be given to the Commissioner's interpretation of the  
27 Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9<sup>th</sup> Cir. 2005);  
28 *Bunnell*, 947 F.2d at 346 n.3.

1 Plaintiff's testimony, the ALJ specifically noted Plaintiff's  
2 allegations that she could not work because of carpal tunnel  
3 symptoms and her skin problems and hair loss that caused her self-  
4 consciousness. (Tr. 68.) He also noted her alleged limitations in  
5 handling, walking, sitting and driving. In his credibility findings  
6 the ALJ specifically referenced evidence, including Plaintiff's own  
7 statements, that is inconsistent with the alleged degree of  
8 limitation. (Tr. 68-69.) For example, he noted negative test  
9 results for systemic lupus, no report of lupus symptoms and medical  
10 opinions from specialists that she would be able to return to full  
11 time work at her previous careers. (Tr. 69.) He also noted the  
12 observation of a medical provider that Plaintiff had calluses on her  
13 hands suggestive of physical activity. (*Id.*) Significantly, the  
14 ALJ found Plaintiff was less than candid at the hearing and in the  
15 medical record regarding her past drug use, including the fact that  
16 she was fired for a positive methamphetamine test. (Tr. 69, 424.)  
17 These are "clear and convincing" reasons to discount a claimant's  
18 credibility. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999).  
19 Also included in the ALJ's credibility findings were references to  
20 reports from two medical sources regarding Plaintiff's truthfulness.  
21 (*Id.*) Two examining physicians reported that on examination,  
22 Plaintiff presented a bag of tobacco and pieces of wood or other  
23 vegetable matter and stated they were metal bits that had been  
24 expelled from her skin as a result from her work at a smelter. (Tr.  
25 426, 496.) The ALJ reasonably found these reports (and laboratory  
26 reports confirming the materials were not metal) impugned  
27 Plaintiff's credibility. (Tr. 69.) The ALJ articulated specific,

1 clear and convincing reasons for finding Plaintiff's allegations not  
2 entirely credible.

3 **B. The Psychological Evaluations**

4 Plaintiff contends the ALJ erred in finding her only mental  
5 limitations in performing work activities are a restriction to  
6 superficial public contact and slow response to transition and  
7 change. (Ct. Rec. 20 at 16; Tr. 68.) She argues this finding is  
8 based on legal error because the ALJ improperly relied on the  
9 opinions of James Bailey, Ph.D., who rendered his opinions in 2000,  
10 based on a review of the records. She further contends the ALJ did  
11 not give legally sufficient reasons for rejecting the opinions of  
12 Shari Lyszkiewicz, M.S., a mental health therapist under the  
13 supervision of Frank Rosekrans, Ph.D., who examined Plaintiff in  
14 2006. (Ct. Rec. 20 at 17.) Plaintiff properly asserts that the  
15 opinions of Dr. Bailey pre-date her amended onset date (December 31,  
16 2002). Therefore, she argues, the ALJ's assignment of "great weight"  
17 to Dr. Bailey's opinions because they are consistent with the record  
18 as a whole is not supported by substantial evidence and based on  
19 legal error. (*Id.* at 18; Tr. 405-07.)

20 In disability proceedings, the ALJ evaluates the medical  
21 evidence submitted and must explain the weight given to the opinions  
22 of accepted medical sources in the record. 20 C.F.R. §§ 404.1527,  
23 416.927. A treating physician's opinion carries more weight than  
24 an examining physician's, and an examining physician's opinion  
25 carries more weight than a non-examining reviewing or consulting  
26 physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup>  
27 Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). The  
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1 Commissioner must provide "clear and convincing" reasons for  
2 rejecting the uncontradicted opinion of a treating or examining  
3 physician. *Lester*, 81 F.3d at 830. If the medical opinion is  
4 contradicted, it can only be rejected for specific and legitimate  
5 reasons that are supported by substantial evidence in the record.  
6 *Andrews*, 53 F.3d at 1043.

7 Historically, the courts have recognized conflicting medical  
8 evidence, the absence of regular medical treatment during the  
9 alleged period of disability, and the lack of medical support for  
10 doctors' reports based substantially on a claimant's subjective  
11 complaints as specific, legitimate reasons for disregarding a  
12 treating or examining physician's opinion. *Flaten v. Secretary of*  
13 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair*,  
14 885 F.2d at 604. The ALJ need not accept a treating source opinion  
15 that is "'brief, conclusory and inadequately supported by clinical  
16 findings.'" *Lingenfelter*, 504 F.3d at 1044-45 (quoting *Thomas*, 278  
17 F.3d at 957). Medical opinions based on a claimant's subjective  
18 complaints may be rejected where the claimant's credibility has been  
19 properly discounted. *Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir.  
20 2005) (credibility properly considered in evaluating medical  
21 evidence); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001).  
22 Rejection of a medical source opinion is specific and legitimate  
23 where the medical source's opinion is not supported by his or her  
24 own medical records and/or objective data. *Tommasetti*, 533 F.3d at  
25 1041.

26 Here, Dr. Bailey, upon whom the ALJ relied in his RFC  
27 determination, is not an examining physician. (Tr. 69, 405-22.) As  
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1 a non-reviewing agency psychologist, his opinions do not carry as  
2 much weight as those of Dr. Rosekrans and his associate, who  
3 examined Plaintiff twice in 2006. Further, Dr. Bailey reviewed the  
4 medical evidence in December 2000. (Tr. 407.) At that time,  
5 Plaintiff had not been diagnosed with depression. The record shows  
6 Plaintiff's depression developed over the years after 2000, as a  
7 result of ongoing medical problems arising from the diagnosed carpal  
8 tunnel syndrome and surgeries, dermatitis, and unresolved alopecia,  
9 whose etiology remained undetermined during the claimed period of  
10 disability. (Tr. 461, 537-38, 559.) In his December 2000  
11 Psychiatric Review Technique Form, Dr. Bailey did not identify a  
12 diagnosis of depression or mood disorder. (Tr. 409.) Further, in  
13 his assessment of Plaintiff's mental limitations, Dr. Bailey did not  
14 consider the effects of depression, which the ALJ found was a severe  
15 impairment at step two. The ALJ's reliance on Dr. Bailey's opinions  
16 based on records predating Plaintiff's alleged onset date is not  
17 supported by substantial evidence and is based on legal error.

18 The record shows Plaintiff was diagnosed formally with a mood  
19 disorder with depressive features in January and June of 2006 by Dr.  
20 Rosekrans and associate. (Tr. 537.) As noted above, the ALJ  
21 credited this diagnosis when he found Plaintiff had the severe  
22 impairment of depression. (Tr. 61.) Although the ALJ discussed  
23 Dr. Rosekrans' findings, (Tr. 66), he did not reject specifically  
24 the marked mental functioning limitations assessed during the  
25 relevant period. (Tr. 541, 549.) His reasoning that she "gets out  
26 in public despite her reluctance to wear wigs" is not sufficiently  
27 specific or "clear and convincing" to reject marked limitations in  
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1 Plaintiff's ability (1) to interact with the public in a work  
2 environment; and (2) "respond appropriately to and tolerate the  
3 pressures and expectations of a normal work setting." (Tr. 69,  
4 541.)<sup>3</sup> Further, the hypothetical presented by the ALJ to the VE at  
5 steps four and five did not include the unrejected moderate and  
6 marked limitations assessed by Dr. Rosekrans, rendering the VE  
7 testimony unsupported by substantial evidence. (Tr. 623.) See  
8 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005).

9 Because the ALJ's mental RFC determination is not supported by  
10 substantial evidence and is based on legal error, reversal and  
11 remand is necessary.

### 12 **C. Remedy**

13 There are two remedies when the ALJ fails to provide adequate  
14 reasons for rejecting the opinions of an examining psychologist.  
15 The general rule, found in the *Lester* line of cases, is that "we  
16 credit that opinion as a matter of law." *Lester*, 81 F.3d at 834;  
17 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock v.*  
18 *Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989). Under the alternate  
19 approach found in *McAllister*, *supra*, a court may remand to allow the  
20 ALJ to provide the requisite specific and legitimate reasons for  
21 disregarding the opinion. See also *Salvador v. Sullivan*, 917 F.2d  
22 13, 15 (9<sup>th</sup> Cir. 1990) (*citing McAllister*).

23 The court has discretion to remand a case for additional

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25 <sup>3</sup> The 2006 psychological evaluations are not contradicted by  
26 relevant medical evidence; therefore, "clear and convincing" reasons  
27 must be given to reject Dr. Rosekrans' opinions. *Lester*, 81 F.3d at  
28 830.

proceedings and findings or to award benefits. *Smolen*, 80 F.3d at 1292. An immediate award of benefits is appropriate when there are no outstanding issues to be resolved, and it is clear from the record the ALJ would be required to find the claimant disabled were the improperly rejected evidence credited. *Id.* However, where evidence has been identified that may be a basis for rejecting a medical the opinion, but the findings are not articulated, remand is the proper disposition. See *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1990). Here, it is not clear from the record that Plaintiff is disabled due to the diagnosed mood disorder in combination with other established functional limitations. The ALJ identified evidence and made findings impugning Plaintiff's credibility that are amply supported by the record, including evidence regarding Plaintiff's failure to seek treatment for psychological issues. Further, there is reference in the psychological reports to elevated scores in objective testing, but the ALJ failed to consult a medical expert to explain the significance of these scores and other objective test results. Without additional evidence and findings, the record does not conclusively establish disability. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 19**) is **GRANTED** and the matter is **REVERSED AND REMANDED** to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and this decision. **On remand, the ALJ also shall consider new evidence submitted by Plaintiff to the Appeals Council, obtain medical expert testimony and explain what weight, if any, is given**

1 **in his new decision.**

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 27**) is  
3 **DENIED.**

4 3. Application for attorney fees may be made by separate  
5 motion.

6 The District Court Executive is directed to file this Order and  
7 provide a copy to counsel for Plaintiff and Defendant. Judgment  
8 shall be entered for Plaintiff, and the file shall be **CLOSED.**

9  
10 DATED January 14, 2011.

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12  
13 s/ CYNTHIA IMBROGNO

14 UNITED STATES MAGISTRATE JUDGE  
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